87-2031

No. ____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

SHARON LEE LONG,

Petitioner,

v.

LARAMIE COUNTY COMMUNITY COLLEGE DISTRICT; RODNEY SOUTHWORTH, RICHARD WILLIAMS, ROBERT SCHLISKE, and HARLAN HEGLER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. What is the proper standard of appellate review when a trial court admits the testimony of an unendorsed witness, over the objection of opposing counsel, and surprise is achieved through the deliberate concealment of a witness' existence or availability?

2. When Plaintiff proffers "direct" evidence of discrimination, can the trial court properly refuse to apply *Trans World Airlines v. Thurston,* 469 U.S. 111 (1985), only because the trial court, does not, in the first instance, believe or "credit" the proffered direct evidence?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Sharon Lee Long and the Respondents were Laramie County Community College District, Rodney Southworth, Richard Williams, Robert Schliske, and Harlan Heglar.

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OFFICIAL AND UNOFFICIAL REPORTS DELIVERED BELOW

The following reports were delivered on the merits of the case below and can be found in the appendix to this Petition:

1. *Long v. Laramie County Community College*, 840 F.2d 743 (10th Cer. 1988)
2. Findings of Fact and Conclusions of Law: *Long v. Laramie County Community College*, — F.Supp. ____, No. C-82-494-K, filed June 19, 1984.
3. Judgment, *Long v. Laramie County Community College* No. C82-494-K, filed June 19, 1984.
4. Findings and Recommendations of the Grievance Committee, *Long v. Laramie County Community College*, dated April 20, 1982.
5. Findings and Decision of the Board of Trustees of Trustees of Laramie County Community College, dated May 12, 1982.
6. Statement of Findings, Department of Education Office of Civil Rights, *Long v. Laramie County Community College*. Docket #08822015 of November 3, 1982.

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The Petitioner, Sharon Lee Long, prays that the Supreme Court grant a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals entered on February 23, 1988. The Tenth Circuit affirmed the decision of the trial court to admit the testimony of an unendorsed witness over the objection of Long's counsel in the face of deliberate attempts to conceal the existence of the unendorsed witness by opposing counsel. In addition, the Tenth Circuit affirmed the trial court's refusal to shift the burden of proof from a Title VII litigant when direct evidence of discrimination was offered by the Plaintiff, because the lower court did not believe the direct testimony proffered.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 840 F.2d 743 and is reprinted in the appendix hereto p.1a. infra.

JURISDICTION

The Petitioner seeks review of the judgment of the Court of Appeals for the Tenth Circuit entered on February 23, 1988. The Tenth Circuit *inter alia* upheld the admission of the testimony of an unendorsed witness over the objection of opposing counsel and held that the trial court correctly refused to apply *Transworld Airlines, Inc. v. Thurston,* 469 U.S. 111, (1985). The Tenth Circuit also affirmed summary judgment for all Defendant's on the Title VII claim and affirmed summary judgment in favor of Defendant's Williams, Schliske, Heglar and the College District with respect to Petitioner Long's claims for retaliatory conduct under 42 U.S.C. §§ 1983 and 1985.

The jurisdiction of the Court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. of 1254(1).

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et* seq.; and Rule 16(e) of the Federal Rules of Civil Procedure.

§ 2000e-2. Discrimination because of race, color, religion, sex, or national origin.

(a) It shall be an unlawful employment practice for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin, or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would

deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§ 2000e-3. Other unlawful employment practices.

(a) Discrimination on account of opposition to unlawful practices or participation in investigation, proceeding, or hearing. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 USCS §§ 2000e-2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 USCS §§ 2000e-2000e-17].

FEDERAL RULES OF CIVIL PROCEDURE 16

Pretrial conferences; scheduling; management

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or his own initiative, may make such orders with regard thereto as are

just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

STATEMENT OF THE CASE

Plaintiff Sharon Lee Long was hired by the College in August of 1977. She was offered and accepted a contract for employment as a "part-time" instructor of a computer course for the 1977 Fall semester. After the Spring of 1979 the college employed Rodney Southworth as its first full-time computer instructor. From the fall of 1977 through the Spring of 1981, Long performed her duties capably and completely and she received positive input about her job performance. XXIV R. pl. ex. 2 at 2-3; VI R.11.

In 1979 and 1980 Southworth and at least one student told Long that Southworth was sexually involved with female students. VI R. 19-20. Although Long did not initially report these allegations, by October 1980 Southworth's sexual involvements were beginning to affect her career and relationship with students and peers. XI R. 20.

Long testified that Southworth made sexual advances toward her on at least two occasions XI R. 23, IV. R. 2264; IV R. 2264, VI R. 25. Southworth disputed the allegations. XR. 382-89, but admitted having a sexual relationship with one employee. X. R. 370 45. The college placed Southworth on probation. XR 370, 45. Long believed, however, that the college retaliated against her by criticizing her job performance and refusing to re-hire her to teach in the summer or fall semester.

Long contacted a Cheyenne, Wyoming law firm concerning her problems at the college. An intern there investigated and made a report. With Long's approval, the LCCC Board of

Trustees treated the report as an administrative grievance under the administrative grievance procedures of the college and the Wyoming Administrative Procedure Act, Wyo. Stat. §§ 16-3-101 to 16-3-115.

At trial, the Defendant called Thompson, Long's ex-husband, to impeach Long's credibility. Thompson was called as Defendant's first witness VIII. R. 58. Mr. Thompson was not endorsed on Defendant's witness list. When Thompson appeared Long screamed and fell to the floor. Long vigorously objected to the trial court's permitting Thompson to testify. Long pointed out that Thompson's name did not appear on the witness list. Moreover, the pre-trial order provided that the parties could not call witnesses whose names were not listed unless "at least ten (10) days prior to trial" they provided opposing counsel the names and addresses of the additional witnesses, together with a summary of their expected testimony. III R. 968.

In response to the objections, counsel for Southworth admitted he knew of this witness some two and a half or three weeks earlier but stated that in view of Long's earlier insistence that Thompson was dead, it was a deception that was being attempted on the court, rather than on the plaintiff. He further argued that he knew that if the witness was listed, some story would be brought up that they would not have time to rebut and felt it in the best interest of justice not to reveal the name. IX R. 66.

The Tenth Circuit observed that the question before it was whether the trial judge abused his discretion in relieving the defendants from the provisions of the pretrial order. The trial judge had stated that the objection to Thompson's testimony was addressed to the discretion of the court. IX R. 73. The Tenth Circuit held:

> "The terms of the pretrial order prohibiting the calling of unlisted witnesses did, of course, have binding effect on the parties. *Perry v. Winspur,* 782 F.2d 893, 894 (10th Cir. 1986). However, the 'trial court may modify the pretrial order during trial to prevent manifest injustice.' *Grant v. Brandt,* 796 F.2d 351, 355 (10th Cir.

1986); *see also Patterson v. F. W. Woolworth Co.*, 786 F.2d 874, 879 (8th Cir. 1986) ("flexible application of pretrial orders is within the sound discretion of the District Court"); *Hull v. Chevron U.S.A., Inc.*, 812 F.2d 584, 588 (10th Cir. 1987)."

At trial Long argued that the findings and decisions of the Board of Trustees in her favor constituted "direct evidence" of discrimination. In those proceedings all of the defendants in the federal suit had been parties and the final decision of the Board had not been appealed. Long argues that the burden was therefore on defendants to prove by a preponderance of the evidence that discrimination did not occur, and not merely to articulate a reason for the discriminatory conduct complained of. Moreover, the trial judge erred by not requiring that the defendants prove by a preponderance of the evidence that they would have decided not to grant her the teaching contract in any event.

The Tenth Circuit acknowledged that the *McDonnell-Douglas* test is "inapplicable where the plaintiff presents direct evidence of discrimination." *See Trans World Airlines Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Furr v. A. T. & T. Technologies, Inc.*, 824 F.2d 1537, 1549 (10th Cir. 1987). However, the Tenth Circuit cited *Terbovitz v. Fiscal Court of Adair County*, 825 F.2d, 111, 116-15 n.1, (6th Cir. 1977), for the proposition that if the fact finder does not "credit" the Plaintiff's direct evidence of discrimination, the *McDonnell-Douglas* mode of analysis still applies. The Tenth Circuit apparently believed it could disregard this court's decision in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) simply because there was "ample" evidence in the record from "which the trial judge could disbelieve Long and credit Defendant's testimony."

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT CLEARLY ERRED IN APPLYING AN "ABUSE OF DISCRETION" STANDARD OF REVIEW TO THE TRIAL COURT'S DECISION TO ALLOW THE TESTIMONY OF AN UNENDORSED WITNESS, WHERE LONG'S COUNSEL OBJECTED AND OPPOSING COUNSEL ADMITTED TO THE DELIBERATE CONCEALMENT OF THE EXISTENCE OF THE WITNESS.

In the circumstances of this case, Defendants produced as a surprise witness at trial, Long's ex-husband whom she presumed was dead. Mr. Thompson was not listed on Defendant's pretrial order as a witness, even though Defendants had known for several weeks before trial that he was indeed alive and that he would be testifying. Long's counsel had no opportunity to investigate Thompson's background. Furthermore, the entire story of how Ms. Long was notified of Thompson's death and the circumstances surrounding that episode were left uninvestigated. This was manifestly unjust as an unfair surprise which prejudiced the case against Long.

The Court of Appeals acknowledged this injustice.

> The argument of [Defendant's] counsel is wholly unconvincing and inconsistent with the purpose of discovery. The contention harks back to times of surprise achieved through the withholding of witnesses and evidence until a dramatic opportunity for impeachment appeared. That occurred here when Long screamed and fell when Mr. Thompson appeared. Nevertheless, counsel's explanation, admitting a clear violation of the pretrial order offers no support for his position. *Long v. Laramie County Community College,* 840 F.2d. 743, 750.

The Court of Appeals, however, declined to hold that the District Court abused its discretion in admitting Thompson's testimony. *Id.* The importance of Thompson's testimony is demonstrated by the Court of Appeals' decision. The District Court and the Court of appeals *relied* on this erroneously admitted testimony

in discrediting Plaintiff's story and dismissing her Title VII claim. Without the testimony, Plaintiff's Title VII claim may have survived even under the heightened burden imposed by the courts below. The importance of this question, however, is not limited to this case.

The general question of when a witness not specified in the pretrial order pursuant to Fed. R. Civ. P. Rule 16 may be allowed to testify has been subject to varying interpretations. The trial court may allow testimony from such a witness to prevent manifest injustice. Fed. R. Civ. P. 16; *See, Grant v. Brandt,* 796 F.2d 351, 355 (10th Cir. 1986). This principal has been discussed in light of other modifications at trial to pretrial orders. *See, Rock Island Improvement Co. v. Jhelmerich & Payne,* 698 F.2d 1075, 1081 (10th Cir. 1983), *cert. denied,* 461 U.S. 944 (1984). The trial court must appear to have abused its discretion to overturn the trial court's ruling on manifest injustice, and a specific set of criteria have been adopted to test the trial court's use of discretion. *Smith v. Ford Motor Co.,* 626 F.2d 784 (10th Cir. 1980), *cert. denied,* 450 U.S. 918 (1981).

The Court of Appeals in this case purported to rely on these principles in this case. An examination of the cases the court relied on reveals that the Court of Appeals misinterpreted the principle of manifest injustice as it operates in this case.

In *Grant v. Brandt,* 796 F.2d 351, 355 the trial court excluded expert testimony as outside the pretrial order. *Grant,* at 355. The Court of Appeals there concluded that this refusal was not manifestly unjust to the plaintiff, the party moving to amend the pretrial order. *Id.* This case does not support the judgment of the Court of Appeals in this case, since it is clearly distinguishable on its facts, e.g. that court's refusal to allow the witness to testify, while in the case at bar the witness was allowed to testify. Furthermore, *Grant v. Brandt* demonstrates that the party seeking to amend the pretrial order must be the party suffering the manifest injustice. In this case, the trial court and Court of Appeals never addressed the critical question of *who* suffered the manifest injustice. Long suffered a manifest injustice from

the dismissal of her Title VII claim based upon the erroneously admitted testimony, and not restricting defense counsel to their agreement as embodied in the pretrial order. Clearly, then, the court of Appeals erred in its application of the manifest injustice standard.

On this same point, the court of appeals in the case at bar also relied on *Patterson v. F.W. Woolworth Co.,* 786 F.2d 874, 879 (8th Cir. 1986) *cited at* Slip op. p.15. Again, this reliance was completely misplaced. In *Patterson,* the trial court allowed expert testimony in contravention of the pretrial order after allowing the deposition of the witness. *Patterson* at 879. Neither party fully complied with the pretrial order to file anticipated testimony of experts. *Id.* In the case at bar, Long fully compiled with the pretrial order. Moreover, Long had *no* opportunity to depose or investigate Mr. Thompson's testimony or background. The manifest injustice was all against Long, the party the rules seek to protect from surprise. No injustice, manifest or otherwise, would have resulted to Defendants from excluding Thompson's testimony. Clearly, then, the trial court abused its discretion and the Court of Appeals erred in allowing the testimony.

Another axiom of Fed. R. Civ. P. 16 concerning pretrial orders is that they are not to be so rigidly interpreted as to cause inefficiency at trial or, again, manifest injustice. *Long v. Laramie County Community College District,* 840 F.2d. 753 (10th Cir. 1988). The Court of Appeals in the case at bar relied on this principle in finding that the trial court did not abuse its discretion in admitting Thompson's testimony. *Id., citing Hull v. Chevron U.S.A., Inc.,* 812 F.2d 584, 588 (10th Cir. 1987). The case lends no support to the application made of it here by the Court of Appeals. In *Hull* the Court of Appeals held that the trial court did not abuse its discretion in allowing the Defendant to change its theory of the case at trial. The Court specifically found that Chevron was *prepared* to address this theory of the case at trial. *Id.* Furthermore, Chevron interposed no objection and proceeded with trial. *Id.* These facts stand in stark contrast to the facts of the case at bar. Long was totally *unprepared* to meet Thompson's testimony. Long interposed objections and moved the trial court to hold defendants to the pretrial order, thereby preserving the error. Nevertheless, the trial court and

the Court of Appeals brushed aside these arguments, leaving Long at a disadvantage which can only be accurately characterized as a manifest injustice. This Court is her last hope for a remedy to this travesty. In reviewing the question of whether the trial court abused its discretion, this Court should take cognizance of the tests which have been formulated in this area and adopted in the Tenth and Third Circuits. A four-prong test to determine whether the trial court abused its discretion in cases such as these was devised by the Third Circuit in *Meyers v. Pennypack Woods Home Ownership Assn.,* 559 F.2d 894, 904 (3d. Cir. 1977), and adopted by the Tenth Circuit in *Smith v. Ford Motor Co.,* 626 F.2d 784, 797 (10th Cir. 1980), *cert. denied* 450 U.S. 918 (1981). In the case at bar, neither the trial court nor the Court of Appeals examined these precedents in concluding that no abuse of discretion occurred.

The flexibility accorded defendants in this case completely undermines the effectiveness of Fed. R. Civ. P. 16, and makes a mockery not only of the standards of fairness and manifest injustice, but reduces pretrial orders in general to paper tigers, shams subject to the *ad hoc* whims of the trial court judge. Petitioner submits that this court should fashion or endorse a standard of review that balances the right of a litigant to a fair trial, on the one hand, and the necessity of trial court discretion, on the other.

II. THE TENTH CIRCUIT CLEARLY ERRED IN REFUSING TO APPLY *TRANS-WORLD AIRLINES V. THURSTON,* 469 U.S. 111, (1985), (AND THUS TO SHIFT THE BURDEN OF PROOF FROM PLAINTIFF TO DEFENDANT), ON THE GROUNDS THAT THE TRIAL COURT COULD PROPERLY CHOOSE NOT TO "CREDIT" THE DIRECT EVIDENCE OFFERED BY THE PLAINTIFF.

In McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court held that the plaintiff must carry the initial burden of proving a *prima facie* case of discrimination. This burden was later held inapplicable where plaintiff presents *direct evidence* of discrimination. *Trans World Airlines, Inc. v. Thurston,* 469 U.S.

111, 121 (1985); *Furr v. A.T.&T. Technologies, Inc.*, 824 F.2d 1537, 1549 (10th Cir. 1987). This limitation has been held inapplicable if the district court does not credit plaintiff's direct evidence of discrimination. *Terbovitz v. Fiscal Court of Adair County*, 825 F.2d 111, 114-115 n.1 (6th Cir. 1987); *Long v. Laramie County Community College District*, 840 F.2d 743 (10th Cir. 1988).

The District Court held plaintiff to the standard of demonstrating by a "preponderance of the evidence" that defendants' actions were discriminatory. The District Judge discredited plaintiff's direct evidence of discrimination. The Tenth Circuit court of appeals upheld this finding on the basis of the "clearly erroneous" standard of Fed. R. Civ. P. 52(a) and *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). The Tenth Circuit held that since the District Court judge did not believe the proffered direct evidence, the *McDonnell-Douglas* evidentiary framework was proper, and that plaintiff did not carry her burden of proof.

Long first contends that these holdings were in error on the specific facts of this case. Second, Long challenges the legitimacy of the Tenth Circuit Court of appeals application of the *Terbovitz* holding. Finally, Long prays that this Court would further clarify and refine the standard of direct evidence in *Trans World Airlines v. Thurston.*

Long's direct evidence of discrimination in this case was overwhelming. She established the findings of the Grievance Committee of Laramie County Community College that she was discriminated against. Long established the findings of the Laramie County Community College Board of Trustees that Defendant Southworth sexually harassed Long and professionally harassed Long as well; that she received retaliatory action from agents of Laramie County Community College, and was not reemployed as a result. Defendants entered into a stipulation agreeing to a report of the Title VII discrimination, which was ignored by the District Court and the Court of Appeals. Long established the findings of the office of Civil Rights of the State of Wyoming that she was fired in retaliation for her efforts on

behalf of female students who were being sexually harassed. These findings constitute admissions of the defendants and findings of special agencies designed to investigate and identify meritorious claims. The direct evidence of discrimination was beyond arguments over credibility.

The District Court, however, found that Title VII trials were *de novo* and that it was not bound by those findings or admissions. The court discredited this evidence by saying that such evidence was based solely on the plaintiff's version of the facts, unsubstantiated and uncorroborated by witnesses before the court. This approach to the standard is clearly in error. First, the trial court's holding that the administrative proceedings were based solely on the plaintiff's version of the facts is factually incorrect. The Board of Trustees and the Grievance Committee hearings were both conducted as contested cases. All parties were represented by counsel except Defendant Southworth. Witnesses were examined, cross-examined, and the Board and the Grievance Committee entered their respective findings, conclusions, and decision. The District Court ignored these proceedings, however, and found erroneously that these accounts were based only on Long's unsupported version of the facts. The Tenth Circuit erred as well in finding the court was not bound by those findings.

This Court must correct such an error by showing the lower courts the difference between direct evidence and collateral estoppel. Long does not contend that the administrative findings bind the court to the legal conclusion of discrimination; that would be correct as an application of collateral estoppel. Long merely contends that the *McDonnell-Douglas* test is inappropriate when the volume of direct evidence is so overwhelming as it is in the case at bar, as has been held in the cases of *Trans World Airlines Inc. v. Thurston, supra,* and *Furr v. A.T. & T. Technologies, Inc., supra.* On a record such as is in evidence, the District Court should not be free to disregard so great a volume of direct evidence of discrimination, particularly where the issue of credibility turned on the unrelated matter of a dead husband testifying in the finest tradition of trial by ambush.

Long challenges the Court of Appeals' application of the holding in *Terbovitz v. Fiscal Court of Adair County,* 825 F.2d 111, 114-15 n.3 (6th Cir. 1987). The Court of Appeals' opinion relies on footnote 3 of *Terbovitz* as authority for the proposition that the District court may disbelieve the direct evidence and, on that basis, hold plaintiff to the *McDonnell-Douglas* test of her case. An examination of this case and its background reveals its gross misapplication in this case.

In *Terbovitz v. Fiscal Court of Adair County, supra* the District Court held that the direct evidence was credible enough to escape the *McDonnell-Douglas* test, *Terbovitz* at 115. The Court of Appeals affirmed, holding that Long's burden of proving discriminatory motivation was more likely than not the 'true' reason for the employer's decision. In footnote number three, *Terbovitz,* 825 F.2d at 115, the Court of Appeals asserted, "Of course, if the district court does not believe the plaintiff's proffered direct evidence, then the evidentiary framework of *McDonnell-Douglas* is the proper mode of analysis." The issue of credibility is now before this Court for explicit resolution. The Court of Appeals has added it to the plaintiffs' burden. This additional burden is nowhere to be found in the policies of Title VII or of this Court's decisions under the statute.

Furthermore, adding the credibility question to the plaintiff's burden creates an adversarial hearing. That is clearly not what the Court intended when it formulated the exception. In *Trans World Airlines v. Thurston,* 469 U.S. 111, 121 (1985) the Court held the *McDonnell-Douglas* test inapplicable when the plaintiff shows direct evidence of discrimination. Justice Powell characterized the test as a shield for plaintiffs, designed to assure the plaintiff his day in court even if no direct evidence existed. *Id.* For the direct evidence exception, the Court relied on *Teamsters v. United States,* 431 U.S. 324, 358, n.44 (1977). Justice Stewart in that footnote explicity stated that direct proof was not necessary under the *McDonnell-Douglas* test, and that mere elimination of legitimate reasons for rejecting a job applicant could raise the inference of discrimination. *Id.* at 358. Again, the Court sought to shield plaintiffs from the unfair burden of proving their case before trial. In contrast, the District Court

and the Court of Appeals here seek to make *McDonnell-Douglas* into a sword, forcing plaintiff to establish not only direct, but also credible, evidence of Title VII violations. The addition of this burden to the plaintiff's case vitiates the direct evidence exception to the *McDonnell-Douglas* test, making a sword out of plaintiffs' shield.

The practical impact of allowing the addition of the credibility test is to bring in a great deal of extraneous information unrelated to the issues of discrimination. In this case, assuming, *arguendo,* that Long was not a credible person in other aspects of her life, the defense and the courts below contend that she is therefore not entitled to redress her grievances for discrimination against her. The trial court explicitly held that when the court disbelieves the evidence, plaintiff must stand ready to prove allegations under the *McDonnell-Douglas* test. Counsel cannot rely on any certain standard of what constitutes direct evidence if he cannot rely on the evidence presented in this case. The direct evidence exception is again vitiated, and constitutes only a trap for unwary counsel.

Long's Title VII claim was entirely lost on the basis of the District Court taking testimony on issues completely unrelated to the issue then before the court. This Court must rectify this injustice.

CONCLUSION

A trial court's broad discretion to modify the pre-trial order must be circumscribed within narrow limits where an unendorsed witness' existence is deliberately concealed from opposing counsel and irreversible prejudice to any party results. The Petitioner submits that the Supreme Court should fashion a new standard of review in order to further the twin goals of uniformity and justice. The Title VII litigant's burden of persuasion is compounded when trial courts may refuse to shift the burden of proof to the Defendant, in spite of "direct" evidence of

discrimination, only because they do not "credit" or believe the "direct" evidence offered, particularly where, as in the case at bar, the "direct" evidence offered consists of findings of fact by a state administrative agency or the Defendant's own governing body.

Respectfully submitted

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APPENDIX "A"

SHARON LEE LONG, *Plaintiff-Appellant,*
v.
LARAMIE COUNTY COMMUNITY COLLEGE DISTRICT; RODNEY SOUTHWORTH; RICHARD WILLIAMS; ROBERT SCHLISKE; HARLAN HEGLAR, *Defendants-Appellees.*

No. 84-2382.

United States Court of Appeals,
Tenth Circuit.

Feb. 23, 1988.

A former part-time instructor at a community college filed a Title VII action and raised claims under the federal civil rights statutes and state tort law. The United States District Court for the District of Wyoming, Ewing T. Kerr, J., granted summary judgment in favor of the community college and its officials. Instructor appealed. The Court of Appeals, Holloway, Chief Judge, held that: (1) findings by the community college board of trustees and grievance committee that sexual harassment had occurred were not binding in a de novo Title VII action; (2) the District Court did not abuse its discretion in permitting the instructor's former husband to testify, even though his name was not listed in the pretrial order; (3) alleged retaliatory discharge was not actionable under the general civil rights statutes; and (4) genuine issues of material fact existed, precluding summary judgment for the college and its officials, in the employee's civil rights action.

Affirmed in part, reversed in part and remanded.

1. Civil Rights—38

Proceedings in former part-time instructor's Title VII action against community college were de novo and, therefore, district court was not bound by findings of community college's grievance committee, its board of trustees or EEOC. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

2. Civil Rights—44(5)

Ample evidence was presented from which district court could disbelieve former part-time instructor and credit community college officials' testimony in instructor's Title VII action against college alleging sexual harassment and retaliation; record supported findings that community college had presented legitimate reasons for failure to offer instructor additional employment, including reduced need for part-time faculty and availability of more qualified and highly trained instructors. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

3. Federal Civil Procedure—1941

Permitting part-time instructor's former husband to testify in her employment discrimination action against community college did not violate local rule prohibiting testimony of witness unless name of witness and summary of his testimony appeared on witness list, where former husband's testimony was offered solely to impeach instructor's veracity. U.S.Dist.Ct. Rules D.Wyo., Rule 208(e)(1, 3).

4. Federal Civil Procedure—1938

Language of pretrial order in part-time instructor's employment discrimination action precluded her former husband's testimony where he was not listed in pretrial order. U.S.Dist.Ct.Rules D.Wyo., Rule 208(e)(1,3).

5. Federal Civil Procedure—1938

District court did not abuse its discretion in permitting part-time instructor's former husband to testify in instructor's employment discrimination action to impeach instructor's veracity, even though former husband's name was not included on pretrial order. U.S.Dist.Ct.Rules D.Wyo., Rule 208(e)(1,3).

6. Judgment—828(3.9)

Findings of community college's board of trustees and grievance committee were entitled to collateral estoppel effect

on former part-time instructor's civil rights claims for violation of her equal protection rights and conspiracy to violate those rights; board and committee acted in judicial capacity in finding that sexual harassment existed. 42 U.S.C.A. §§ 1983, 1985, 1985(3); U.S.C.A. Const.Amend. 14.

7. Conspiracy—7.5

Retaliatory-discharge theory does not give rise to viable claim under civil rights conspiracy statute; rather, retaliatory discharge supports only Title VII claim. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1985.

8. Civil Rights—13.4(1)

Retaliatory-discharge theory does not give rise to viable claim under federal civil rights statutes; rather, retaliatory discharge supports only Title VII claim. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A § 1983.

9. Federal Civil Procedure—2491.5

Genuine issues of material fact existed, precluding summary judgment, on former part-time instructor's claims under federal civil rights statutes against community college and its officials for allegedly improper supervision and control of instructor's supervisor and for acquiescence with respect to state law claims for intentional infliction of emotional distress, negligence, and similar theories. 42 U.S.C.A. §§ 1983, 1985; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

10. Federal Civil Procedure—2491.5

Findings by community college board of trustees and grievance committee that alleged supervisor sexually harassed former part-time instructor did not establish liability per se under federal civil rights statutes, but did show existence of genuine issues of material fact, precluding summary judgment for college and

officials. 42 U.S.C.A. §§ 1983, 1985; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

11. Federal Civil Procedure—2491.5

Genuine issues of material fact existed, precluding summary judgment for alleged supervisor, on his supervisory status over former part-time instructor and on whether he sexually and professionally harassed instructor, for purposes of instructor's action under federal civil rights statutes. 42 U.S.C.A. §§ 1983, 1985; Fed. Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

Richard C. LaFond of LaFond & Evangelisti, Denver, Colo. (Jay Dee Schaefer, Schaefer & Newcomer, Laramie, Wyo., was also on the brief), for plaintiff-appellant.

Craig Kirkwood (Kennard Nelson of Kirkwood, Copenhaver & Nelson, Laramie, Wyo., was also on the brief), for defendants-appellees.

Before HOLLOWAY, Chief Judge, and McWILLIAMS and McKAY, Circuit Judges.

HOLLOWAY, Chief Judge.

Plaintiff-appellant Sharon Lee Long, a former part-time instructor in computer science, brought this action against defendants-appellees Laramie County Community College District and several of its administrators and employees. Long seeks declaratory and injunctive relief and back pay under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, for alleged disparate treatment resulting from sexual harassment and retaliatory treatment. She also seeks compensatory and punitive damages under 42 U.S.C. §§ 1983, 1985 and state common law tort theories. Plaintiff appeals the trial court's judgments in favor of defendants-appellees.

I

A. *The factual background.*

The record reveals the following evidence relevant to this appeal:

Defendant Laramie County Community College (LCCC) hired Sharon Lee Long in August 1977 after she had responded to a newspaper advertisement placed by LCCC. At the time she applied, Long had a high school diploma, three and one half months of training with International Business Machines, Inc. and a few accounting and computer courses through community colleges. She had no college degree and she took no additional courses while at LCCC. The chairman of the business division, defendant Richard Williams, interviewed Long and offered her a contract to teach an introductory business data processing class part-time in the fall semester of 1977, which Long accepted. Long was employed on a semester by semester basis.

After the spring of 1979 LCCC employed defendant Rodney Southworth as its first full-time computer instructor. Long testified that Southworth was her immediate supervisor and that he controlled her scheduling and assignments; Southworth denied being her supervisor and disputed her testimony on his authority over her.

Long's courseload temporarily declined in 1979 when Southworth started as a full-time instructor. When he began teaching higher level courses in the spring of 1980, Long's courseload again increased. The parties stipulated that from the fall of 1977 through the spring of 1981, Long performed her duties capably and competently and she received positive input about her job performance. XXIV R. pl. ex. 2 at 2-3; VI R. 11.

Long testified that in 1979 and 1980 Southworth and at least one student told her that Southworth was sexually involved with female students. VI R. 19-20. At trial Southworth admitted having affairs with one H. and one other student in the fall of 1979 and the spring of 1980. X R. 370-372. Although Long did not initially report these allegations, by October 1980 she testified that Southworth's sexual involvements were beginning

to affect her career and relationships with students and peers. XI R. 20.

Long had a dispute with H., who was a member of the LCCC student chapter of the Data Processing Management Association, a group interested in data processing for which Long was faculty advisor. After a business portion of an October 17, 1980 meeting, Long testified that she called Southworth into the hall and "asked him to please get his girlfriends in line," as they were affecting her professionally. Southworth became angry and protested her going to his wife, the Board of Trustees or defendant Williams with her accusations.

There was a further incident between Long and Southworth on October 24, 1980. Long testified that she met Southworth in his office and that he leaned over and put his hands on hers and said: "I'm really sorry, but I've been neglecting you lately, Sharon. If you want to spend some special time with me, I'm sure we can make everything fine. The students don't mean much to me. Let's just find some extra time to spend together by ourselves." Long interpreted the remarks as a sexual advance and left Southworth's office. XI R. 23; IV R. 2264. About a month later, Long testified that Southworth made a similar statement when she met him at a local bar to discuss their deteriorating working relationship. Long said that Southworth told her that if she would make apologies for some untruths about him, he would see to it that she had the same number of classes to teach in the spring of 1981 as she had in the fall and that he would take her away and they would "spend a lot of time together." She interpreted these remarks again as a sexual advance and threat, and left this meeting in tears. IV R. 2264; VI R. 25.

Southworth disputed Long's version of these meetings directly. He said that in the office meeting he had told Long he hoped they could communicate effectively and denied the remarks interpreted as a sexual advance. Southworth denied making any representations at the off-campus meeting about Long's teaching load and testified he was in no position to determine her workload. X R. 382-89.

Long testified that after she told Southworth she did not want an affair with him, he and others at the college made special criticisms of her job performance, which she had not had before. Long testified that she learned from class schedules that the college did not rehire her to teach in the summer or fall semesters of 1981. Southworth was not speaking to her at this time and defendant Williams would only speak with her when his secretary was taking notes. VI R. 36-38. Again, the defendants' versions of these events differed sharply with Long's statements. While Long said she had raised Southworth's sexual harassment of her and the students at November and December 1981 meetings, defendants Williams, Schliske and Heglar all testified that the meetings did not involve Southworth's alleged sexual harassment of her. XI R. 573, 661; XII R. 755.

There was testimony that in February 1981 there was a meeting of Southworth with Heglar and Schliske. Southworth first denied any involvment with students, but when he was told that someone had reported such an involvement, Southworth admitted having a sexual relationship with one employee, but denied relationships with others. X R. 390-91. Southworth had a relationship with one other student, according to some testimony. X R. 370, 45. The college staff placed Southworth on probation and told him that if he had any sexual involvement with students or committed other improprieties, he would be discharged. Southworth testified that he lived up to the terms of his probation. X R. 392, 404.

The defendants testified there were non-discriminatory reasons for the reduction of Long's teaching load and their decision later not to re-employ her at all. LCCC hired a second full-time instructor in the spring of 1981 for the computer science program. Williams testified that this employee's presence and a normal decline in the demand for courses in the spring of 1981 accounted for a second reduction of Long's courseload from five to two courses in the spring of 1981. Defendants also presented evidence that LCCC did not offer a teaching contract to Long during the 1981 summer session because she had taught two courses in the spring while a better qualified instructor was available and requested one course. Under a new rotation

policy, Long was not allowed to teach summer classes in order that the other instructor could teach two courses during that session. Lastly, the decision not to employ Long in the fall of 1981 was based on the availability of more qualified part-time instructors, on the improvement in the data processing program, on the lack of improvement in Long's qualifications, and on the fact that Long had started some rumors and had a poor relationship with defendant Williams and a lack of communication with the remainder of the faculty. XI R. 526-27.

Long contacted a Cheyenne, Wyoming law firm concerning her problems at the college. An intern there investigated and made a report. With Long's approval, the LCCC Board of Trustees treated the report as an administrative grievance under the administrative grievance procedures of the college and the Wyoming Administrative Procedure Act, Wyo.Stat. §§ 16-3-101 to 16-3-115.

A college Grievance Committee hearing was held and the committee made findings and recommendations. Under the school's procedure, findings and decisions of the Board of Trustees of the college followed after review of the committee findings and recommendations. The Board found that those named as parties against whom the grievance was submitted included Rodney Southworth, Dean Schliske, Mr. Williams, Division Chairman, and Dr. Heglar, President of the College, and the College itself. The Board found that a hearing had been held before the Committee. An attorney appeared for Long and another attorney entered an appearance on behalf of all the respondents except Southworth, who represented himself. Testimony was taken for approximately 18 hours and transcribed.

The Board found that there was a basis for the claimed grievance by Long. The Board recognized that sex discrimination is an employment practice in which an employer or his agents discriminate on the basis of sex; that sexual harassment is a form of sex discrimination; and that sexual harassment is any behavior, unwelcome or unsolicited, verbal or physical, which imposes a requirement of sexual cooperation as a condition of employment

or advancement; and that sexual harassment may range from innuendo to coerced sexual relations.

The Board considered that professional harassment is conduct which has the purpose of affecting or substantially interfering with an individual's performance and/or creating an intimidating, hostile or offensive working environment. The Board found that the administrative record supported the findings of the Grievance Committee that Southworth sexually harassed Long and professionally harassed Long as well; that Long sought redress with various agents of the college for such harassment; and that she received retaliatory action from agents of the college and, as a result, was not re-employed by the college.

The Board entered legal conclusions and a decision that the college should reinstate Long in a position, appropriate to her education and teaching abilities as of the fall semester of 1982, that the college should repay her back wages of $4,080.00, and $1,500.00 as a reasonable attorney's fee for the grievance procedure representation. The Board found that a written sexual harassment policy should be presented for consideration by the Board. It found further that should Southworth later be found guilty of sexual harassment of an employee or student of the college, or of professional harassment and/or professional retaliation against an employee of the college he should immediately be subject to notice and discharge by the Board. Pl. Exs. 1 and 15.

In view of more difficulties with the college, Long filed further charges with the Office of Civil Rights of the Department of Education of Wyoming. That office investigated and made findings that the college did not re-employ her as a retaliation for her efforts on behalf of female students who were being sexually harassed. The college offered an agreement about her employment, conditioned on Long's release of further claims for lost compensation or other damages, but she declined to agree to such a waiver. Long filed discrimination charges with the EEOC in February 1982. The EEOC made findings and recommendations and issued a notice of right to sue. The college complied with the recommendations, increasing the back pay, *inter alia*.

B. *The court proceedings*

Following her refusal to sign the waiver discussed above, Long brought this suit under Title VII and 42 U.S.C. §§ 1983 and 1985, alleging sexual and professional harassment and retaliation for her actions protesting sexual harassment of students and herself. The trial judge bifurcated the trial of the Title VII claim from the § 1983 and § 1985 and pendent claims on his own motion. A non-jury trial of the Title VII claims was held first, without objection by the plaintiff to that procedure. Long claimed at this trial that Southworth had harassed her and various students, that the defendants retaliated when she reported his activities by making her conditions of employment more difficult and ultimately refusing to renew her contract. VIII R. 6-7. Long relied on the findings of the Grievance Committee and the LCCC Board of Trustees as "direct evidence" of sexual harassment and retaliation, and argued that when she rested, defendants had the burden of proving that they had no discriminatory motive.

The defendants, Southworth, Williams, Schliske, President Heglar and the College, defended first by challenging the credibility of Long and denying her charges. Individual defendants and women whom Southworth allegedly harassed contradicted Long's testimony concerning the facts. Her former husband, Thompson, contradicted testimony of Long in her deposition and at the grievance hearing. He testified he had been discharged from the military in April 1972 and was living in North Carolina, at the time when Long later claimed that she had received notice of his death. He had called and asked her to come to North Carolina to join him. According to Thompson, Long had been in a mental hospital, had been involved in an affair, and her reputation for truthfulness was bad.

The defendants argued that Southworth had not harassed Long; that the college had not engaged in any retaliation against her; and that the college was not obligated to renew her teaching contract. Furthermore it did not renew it because she had not improved her qualifications to keep pace with the computer

science program and it was easier to hire others than to continue a "battle" the college considered resolved.

The trial judge found that under *McDonnell-McDouglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), Long had failed to establish a prima facie case of sex discrimination because she had failed to prove that Southworth had sexually harassed her or that the college or the individual defendants had retaliated against her. In any event, the judge found that the defendants had articulated legitimate reasons for their failure to offer Long additional employment and that the reasons given by the defendants were not shown to be pretexts for discrimination. The court said that in the *de novo* proceedings it was not bound by the findings of the Grievance Committee or the Board of Trustees which were based on Long's unsubstantiated and uncorroborated version of the facts and that Long's credibility was highly questionable.

After the trial court entered judgment for defendants on the Title VII claims, the defendants moved for summary judgment on the remaining claims, arguing that collateral estoppel precluded Long from relitigating the facts. The court granted summary judgment and this appeal followed.

Long makes three principal arguments on appeal which we consider in Parts II through IV, *infra*.

II

The Title VII trial and findings

Long argues that the findings and decisions of the Board of Trustees in her favor constituted "direct evidence" of discrimination. In those proceedings all of the defendants in the federal suit had been parties and the final decision of the Board had not been appealed. Long argues that the burden was therefore on defendants to prove by a preponderance of the evidence that discrimination did not occur, and not merely to articulate a reason for the discriminatory conduct complained of. Long says that the trial judge erred by not requiring that the defendants

prove by a preponderance of the evidence that they would have decided not to grant her the teaching contract in any event.

The *McDonnell-Douglas* test is "inapplicable where the plaintiff presents direct evidence of discrimination." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 621, 83 L.Ed.2d 523 (1985); *Furr v. A.T. & T. Technologies, Inc.*, 824 F.2d 1537, 1549 (10th Cir.1987). However if the factfinder does not credit the plaintiff's direct evidence of discrimination, the *McDonnell-Douglas* mode of analysis still applies. *Terbovitz v. Fiscal Court of Adair County*, 825 F.2d 111, 114-15 n. 1 (6th Cir.1987). If the district court finds that discrimination has been established by the plaintiff's direct evidence, the employer must do more than merely articulate a nondiscriminatory justification and the burden shifts to the employer to prove by a preponderance of the evidence that the adverse employment action would have been taken even in the absence of the impermissible motivation. *Id.* at 115.

[1] However, here the district judge specifically found against the plaintiff on her proffered evidence and did not find that she had established her claims of discrimination and retaliation. The judge said that the proceedings in the Title VII trial were *de novo*, that the court was not bound by the findings of the Grievance Committee, the Board or the EEOC; and that the findings of those agencies were based on plaintiff's version of the facts, unsubstantiated an (sic) uncorroborated by any witnesses before the court. Since the judge did not believe the proffered direct evidence, the evidentiary framework of *McDonnell-Douglas* was the proper mode of analysis. *Terbovitz*, 825 F.2d at 115 n. 3.

[2] The findings of the trial judge on the Title VII case must be judged under the clearly erroneous standard of Fed.R. Civ.P. 52(a). *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). We are satisfied that the record contains ample evidence, including the testimony of Mr. Thompson, from which the judge could disbelieve Long and credit the defendants' testimony. The Title VII findings rejecting the claims of sexual harassment and

retaliation are not clearly erroneous. Moreover the findings that the defendants had presented legitimate reasons for their failure to offer Long additional employment, including a reduced need for part-time faculty and the availability of more qualified and highly trained instructors, were supported by the record. As we discuss below, in the Title VII proceeding the administrative findings were not binding on the court.

In sum, we uphold the findings of the court against Long on her Title VII claim.

III

The admission of Mr. Thompson's testimony

Long contends that the trial court erred in admitting the testimony of Mr. Thompson, her former husband. More specifically, objection is made to the trial court's permitting him to testify at all because his name did not appear on the witness lists of the defendants.

At the time of trial, then Local Rule 8(e)(3) of the District of Wyoming provided that "[e]xcept for impeachment or rebuttal purposes and absent good cause shown," no witness could testify unless his name and a summary of his testimony appeared on a witness list. This Rule has since been superseded. *See* Local Rules of the District Court for the District of Wyoming, Rule 208(e)(1), (3) (April 12, 1985). The pretrial order further provided that the parties could not call witnesses whose names were not listed unless "at least ten (10) days prior to trial" they provided opposing counsel the names and addresses of the additional witnesses, together with a summary of their expected testimony. III R. 968.

At the close of the first day of trial defendants called Thompson as their first witness, offering his testimony for impeachment purposes. VIII R. 58. The judge recessed trial until the next morning, and at that time Long's attorney moved that the court refuse to allow Thompson to testify because he was

not listed on any witness list. Moreover, in view of a stipulation by the parties that Thompson was alive, his testimony would be irrelevant and highly prejudicial under Fed.R.Evid. 403. This latter stipulation was relevant because there had been contradictory statements made by Long in earlier proceedings in which she had stated that she had received notice of Thompson's death.

In response to the objections, counsel for Southworth admitted he knew of this witness some two and a half or three weeks earlier but stated that in view of Long's earlier insistence that Thompson was dead, it was a deception that was being attempted on the court, rather than on the plaintiff. He further argued that he knew that if the witness was listed, some story would be brought up that they would not have time to rebut and felt it in the best interest of justice not to reveal the name. IX R. 66.

The argument of counsel is wholly unconvincing and inconsistent with the purposes of discovery. The contention harks back to times of surprise achieved through the withholding of witnesses and evidence until a dramatic opportunity for impeachment appeared. That occurred here when Long screamed and fell when Mr. Thompson appeared. Nevertheless, counsel's explanation, admitting a clear violation of the pretrial order offers no support for his position.

[3, 4] There was no violation of the Local Rule itself because the defendants called Thompson to impeach Long's veracity. However, the language of the pretrial order does preclude Thompson's testimony and the explanation for disregard of the order is untenable. Nevertheless the question before us is whether the trial judge abused his discretion in relieving the defendants from the provisions of the pretrial order.

[5] The terms of the pretrial order prohibiting the calling of unlisted witnesses did, of course, have binding effect on the parties. *Perry v. Winspur,* 782 F.2d 893, 894 (10th Cir. 1986). However, the "trial court may modify the pretrial order during trial to prevent manifest injustice." *Grant v. Brandt,* 796 F.2d 351, 355 (10th Cir. 1986);*see also Patterson v. F.W. Woolworth Co.,* 786 F.2d 874, 879 (8th Cir.1986) ("flexible application of pretrial orders is within the sound discretion of the District

Court"); *Hull v. Chevron U.S.A., Inc.*, 812 F.2d 584, 588 (10th Cir.1987).

The trial judge stated that the objection to Thompson's testimony was addressed to the discretion of the court. He was best able to assess the circumstances. He concluded that in the interest of justice the objection should be overruled. IX R. 73. We cannot say that there was an abuse of discretion.

IV

The summary judgment for defendants on the claims under §§ 1983 and 1985 and common law tort theories

Long's remaining argument is that the trial court erred by granting the defendants' motion for summary judgment on the remaining claims under §§ 1983 and 1985 and common law theories. In his order granting summary judgment on those claims the trial judge recounted his written findings and conclusions for defendants on the Title VII claim. The court had found that the evidence failed to show sexual harassment of Long by Southworth. The court had found also that there were no acts of retaliation taken by the college or the other individual defendants against Long. The judge concluded that under collateral estoppel principles, the findings from the Title VII hearing applied with respect to the remaining claims, and that Long had failed to show that there were any remaining material facts to be presented at a second hearing. Having found the facts for the defendants and against Long, the judge held that the defendants were entitled to summary judgment on all the remaining claims.[1]

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[1] In addition to the Title VII sexual harassment and retaliation claim, the complaint alleges claims under 42 U.S.C. §§ 1983 and 1985(3) for violation of plaintiff's 14th Amendment equal protection rights and conspiracy to violate those rights (counts 2 and 3); negligence against LCCC for failure adequately to supervise the individual defendants and for failure to provide written policies or guidelines for handling sexual harassment cases (counts 4 and 5); negligence against Heglar, Schliske and Williams for failing adequately to supervise Southworth and for participating in his harassment of plaintiff (count

Long argues that the summary judgment should not have been grounded on the Title VII findings under principles of collateral estoppel. She says that she was entitled to a jury trial on fact issues which remained after the trial court found against her on her Title VII claim and that the initial Title VII trial was not a full and fair opportunity to litigate the remaining claims.

For reasons given later we agree that summary judgment in favor of Southworth and the college must be reversed. We do not, however, accept the arguments that Long has made against any application of the findings from the Title VII proceedings with respect to the remaining claims. Long made a timely demand for a jury trial on these remaining claims, but she did not object to the *de novo* trial by the judge of the Title VII claim first.[2] Long argues, albeit with respect to the discussion of Part II above, that the final decision of the Board of Trustees presented "direct evidence" of discrimination. Long further makes a general argument that the summary judgment against her remaining claims was error. Considering these broad contentions and the Court's holding in *University of Tennessee v. Elliott*, ___ U.S. ___, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986), we agree that the summary judgment as to the defendants was in error.

In *Elliott* the Court held that findings of fact in unreviewed administrative proceedings do not have preclusive effect by collateral estoppel in Title VII cases, but that they do have preclusive effect in § 1983 and other proceedings. The scope of the preclusive effect of the administrative findings was defined in *United States v. Utah Construction and Mining Co.*, 384 U.S.

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6); intentional infliction of emotional distress against Southworth for harassing plaintiff (count 7); intentional infliction of emotional distress against Williams, Schliske and Heglar for retaliating or acquiesing in retaliation against plaintiff (counts 8 and 9); defamation against Southworth for statements he allegedly made to harass plaintiff (counts 10 and 11); and interference with contractual relations against Southworth, Williams, Schliske, and Heglar for their actions which allegedly led to plaintiff's termination (count 12). I.R. 8-21.

[2] No argument is made under *Woods v. Dairy Queen*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962) or *Beacon Theatres v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959), that the order of the trial on the Title VII claim denied Long her right to trial by jury.

394, 422, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642 (1966). In *Elliott* the Court stated:

> . . . Accordingly, we hold that when a state agency "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *Utah Construction & Mining Co., supra,* at 422, 86 S.Ct. at 1560, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts. ___ U.S. at ___, 106 S.Ct. at 3227.

[6] With respect to the test stated in *Elliott,* we are satisfied that the Board of Trustees and the Grievance Committee acted in a judicial capacity in the determinations made with respect to Long's claims. The hearing was conducted pursuant to regulations of the college which it had authority to promulgate under Wyo.Stat. § 21-18-304. The hearing was also conducted in accordance with the Wyoming Administrative Procedures Act. The parties were all represented by counsel except Southworth; he was offered counsel by the college but instead chose to represent himself at the grievance proceedings. Witnesses were examined and crossexamined and documentary evidence was introduced. Thereafter the Grievance Committee made its findings and recommendations which were reviewed by the Board of Trustees and it then entered its own findings, conclusions and decision. We feel that the administrative agencies acted in a judicial capacity within the meaning of *Elliott. See Buckhalter v. Pepsi-Cola Gen. Bottlers, Inc.,* 820 F.2d 892, 896 (7th Cir. 1987); *Yancy v. McDevitt,* 802 F.2d 1025, 1029 n. 2 (8th Cir. 1986).

It is clear that the Board resolved disputed issues of fact which had properly been before it. *Buckhalter,* 820 F.2d at 896. We are convinced that the requirements of *Elliott* for the application of collateral estoppel in the § 1983 and § 1985 proceedings were met.

Since the *Elliott* requirements were met, the findings of the Board and the Grievance Committee were entitled in the proceedings under §§ 1983 and 1985 to the same preclusive

effect that they would have carried in the Wyoming courts.[3] *Elliott*, ___ U.S. at ___, 106 S.Ct. at 3222. In Wyoming, collateral estoppel "involves the preclusion of issues which were actually decided in prior litigation of a different claim or cause of action between the parties." *Rialto Theatre v. Commonwealth Theatres, Inc.*, 714 P.2d 328, 336 (Wyo. 1986). Wyoming employs the doctrine of collateral estoppel to promote finality, reliance by parties on courts to settle disputes, and to conserve judicial resources. *Id.* These interests would be served by giving preclusive effect to the unappealed agency findings. Under Wyoming law we believe the findings of the Board would be given preclusive effect.

[7, 8] We must consider now whether giving such preclusive effect to the Board's findings requires reversal of the summary judgment for Long. The parties before the Board included Williams, Schliske and Heglar, college officials, and the college. The Board found that the record "supports the findings of the Grievance Committee that Sharon Long sought redress with various agents of the college for the aforesaid harassment and that in the process she received retaliatory action from agents of the college, and that, as a result, she was not re-employed by the college." This finding is most reasonably interpreted as adverse to Williams, Schliske Heglar and the college on the federal claims against them. However a theory of liability under federal law for retaliatory conduct by these four defendants does not give rise to a viable claim under § 1985, and instead supports only a Title VII claim. *Great American Federal Savings & Loan Ass'n. v. Novotny*, 442 U.S. 366, 378, 99 S.Ct. 2345, 2352, 60 L.Ed.2d 957 (1979). Nor does such a theory of liability for retaliatory conduct come within § 1983. *Meade v. Merchants Fast Motor Line, Inc.*, 820 F.2d 1124, 1125 n. 1 (10th Cir. 1987); *Tafoya v. Adams*, 816 F.2d 555, 557-58 (10th Cir.) *cert.*

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[3] We realize that giving such preclusive effect to the Board's findings in the § 1983 and § 1985 proceedings produces results at odds with the denial of preclusive effect to those findings in the Title VII proceedings. The inconsistency was noted in the dissent of Justice Stevens in *Elliott*, ___ U.S. at ___, n. 1, 106 S.Ct. at 3227 n. 1. Nevertheless the difference in treatment of the findings is required by *Elliott*.

denied, ___ U.S. ___, 108 S.Ct. 152, 98 L.Ed.2d 108 (1987). In sum, we hold that the summary judgment was proper in favor of Williams, Schliske, Heglar and the college on the federal claims for retaliation asserted under §§ 1983 and 1985.

[9] However, with respect to claims against these four defendants (Williams, Schliske and Heglar and the college), under §§ 1983 and 1985 for allegedly improper supervision and control of Southworth and for acquiescence, resulting in constitutional wrongs, and with respect to the pendent state law claims for infliction of emotional distress, negligence and the like, we are not satisfied that these four defendants have demonstrated that there is no genuine issue as to any material fact pursuant to Fed.R.Civ.P. 56(c), particularly in light of the Board's findings which are evidence adverse to these defendants. Thus the summary judgment pertaining to these federal and pendent claims against these four defendants is reversed and those claims are remanded for further proceedings in the district court. On remand there should be a determination whether valid constitutional claims against these four defendants on such grounds exist.

[10] Since the administrative findings were made first and are to be considered in connection with the pendent state law claims and any constitutional claims, we feel that the trial court erred in granting summary judgment in favor of Williams, Schliske, Heglar and the college. The judge's reason for doing so was that he made *de novo* findings which he relied on in the Title VII suit. He was entitled to do so in that trial. Nevertheless under *Elliott* and Wyoming law the administrative findings of sexual harassment by Southworth and of action by the agents of the college must be considered. They do not establish liability per se but they are evidence, along with the conflicts in testimony, which show that it was error to grant the summary judgment. We therefore reverse the summary judgment in favor of the four defendants and remand the claims against them for further proceedings, except the § 1983 claim for retaliation which may not be maintained in light of the *Tafoya* opinion.

[11] Lastly, we turn to Long's claims against Southworth. There was a clear dispute in the testimony concerning his conduct toward Long and concerning his supervisory status over her. Moreover the Board's findings that he did sexually and professionally harass her were the first findings made and they are entitled to consideration in the proceedings against Southworth on Long's constitutional and pendent state law claims. Again, it was not demonstrated by Southworth that there was no genuine issue as to a material fact and the summary judgment on the claims is reversed and they are remanded for further proceedings.

V

Conclusion

In conclusion, we affirm the judgment for defendants on the Title VII claim. We likewise affirm the summary judgment in favor of defendants Williams, Schliske, Heglar and the college district with respect to Long's claims under §§ 1983 and 1985 for retaliatory conduct. We reverse the summary judgment as to those defendants on the pendent state law claims for negligence, emotional distress and the like, and under §§ 1983 and 1985 on the sexual harassment theory. On remand, it should be determined whether the actions of Southworth, Williams, Schliske and Heglar amounted to any constitutional violations sufficient for liability under §§ 1983 and 1985, by them and the college, except the claim for retaliatory conduct which the *Tafoya* ruling bars.

IT IS SO ORDERED.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

SHARON LEE LONG, *Plaintiff,* vs. LARAMIE COUNTY COMMUNITY COLLEGE DISTRICT; LARAMIE COUNTY COMMUNITY COLLEGE BOARD; RODNEY SOUTHWORTH, RICHARD WILLIAMS, ROBERT SCHLISKE, and HARLAN HEGLAR, *Defendants.*	No. C82-494-K

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter having come on regularly for trial before the Court, sitting without a jury, plaintiff appearing by and through her attorneys, Richard C. LaFond and Jay Dee Schaefer; defendants Laramie County Community College District, Laramie County Community College Board, Richard Williams, Robert Schliske and Harlan Heglar appearing by and through their attorneys, Walter C. Urbigkit and George A. Zunker; and the defendant Rodney Southworth appearing by and through his attorneys, Craig Kirkwood and Kennard F. Nelson; and the Court having heard the evidence introduced on behalf of each of the parties, and having taken said matter under

advisement, and having carefully considered the pleadings, testimony, stipulations and exhibits relevant and material to the matters in dispute, and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

This is a civil action arising under §§ 703 and 704 of Title VII, 42 U.S.C. §§ 2000 e-2, 2000 e-3. Plaintiff is seeking declaratory relief, injunctive relief, back pay, penalties, costs and attorney's fees for alleged unlawful employment practices and policies.

Plaintiff Sharon Lee Long is a white female United States citizen residing in Cheyenne, Wyoming.

Defendant Laramie County Community College District, State of Wyoming is a community college organized under the laws of the State of Wyoming. Laramie County Community College District Board is the governing body of defendant Laramie County Community College District.

Defendant Rodney Southworth is presently and has been at all times relevant herein, since September 1979, employed by defendant Laramie County Community College District, State of Wyoming, as a full-time instructor in the Department of Data Processing.

Defendant Richard Williams is presently and was at all times relevant herein, employed by Laramie County Community College District, State of Wyoming, as Business Division Chairman.

Defendant Robert Schliske is presently and was at all times relevant herein, employed by defendant Laramie County Community College District. State of Wyoming, as Dean of Instruction.

Defendant Harlan Heglar is presently and was at all times relevant herein, employed by defendant Laramie County Community College District, State of Wyoming, as President of the college.

Plaintiff was employed in August 1977 by defendant Laramie County Community College District (LCCC) as a part-time instructor for the department of data processing. Plaintiff had a high school diploma, some training through IBM and a few computer and accounting courses through community colleges. Her education level was not advanced any further during the time of her employment at LCCC.

Plaintiff was employed on a semester-by-semester basis and her class load varied with each semester. Her maximum load occurred in the fall semester of 1980, when due to the college's failure to successfully bring in a second full-time instructor, she taught four regular courses, two micro courses, and was paid as a $^{13}/_{16}$ (of full time) instructor. The following semester, when a second full-time instructor was eventually hired, she had a minimum load of two courses.

Plaintiff's problems at LCCC allegedly began with an incident between plaintiff and a female student at an October 1980 DPMA (student chapter) meeting. Prior to that time, plaintiff was aware that defendant Southworth had been involved in extramarital sexual relationships with students, one of whom was Helen Hankin. The affairs were of limited duration and were terminated by the end of the spring 1980 semester. They were not reported to the college administration while they were in progress. However, plaintiff testified that in October of 1980 the sexual involvements of defendant Southworth began affecting her professional career and her relationship with students and peers.

This change was apparently evidenced by what plaintiff describes as a "vicious attack" on herself by Helen Hankin, a data processing student and officer in the student chapter of DPMA. Testimony at trial revealed that Ms. Hankin questioned the propriety of a Cheyenne newspaper article offering student data processing services to the community. Plaintiff, the faculty advisor of the DPMA student chapter, was in part responsible for the article. Plaintiff testified that she was verbally attacked by Ms. Hankin due to jealousy. Several other witnesses testified about the incident. No witness corroborated plaintiff's version

of the incident. Plaintiff further testified about another attack by Helen Hankin at a later DPMA meeting. Plaintiff contended that at the January 1981 meeting Ms. Hankin became very angry and threw papers and a chair at her. Again, no witnesses present at the meeting corroborated plaintiff's version of the incident.

During the week following the October DPMA meeting, according to plaintiff's testimony, she met with defendant Southworth. At that meeting defendant Southworth allegedly put his hands on hers and made a statement about spending more time together which plaintiff interpreted as a sexual advance. A similar statement was allegedly made by defendant Southworth approximately one month later at a meeting between defendant Southworth and plaintiff at a local bar. Plaintiff also interpreted that statement as a sexual advance. Defendant Southworth denies making any such statements.

Beginning in the early part of December 1980, plaintiff began reporting defendant Southworth's extramarital affairs to various college administrators. Plaintiff met with defendant Williams on December 8, 1980 and met with defendant Schliske shortly thereafter. At both meetings plaintiff reported that defendant Southworth was having sexual affairs with his students, but did not complain of advances toward herself, or any other form of harassment.

In January 1981, plaintiff persuaded Ms. Hankin to set up an appointment with defendant Schliske in order to verify plaintiff's accusations. Ms. Hankin made the appointment in plaintiff's presence and later cancelled it, not wanting to report to defendant Schliske about the matter, which at any rate had been over for some time. However, on January 22, 1981 Ms. Hankin, in response to threats of exposure and publicity by plaintiff agreed to meet with Dr. Heglar about the matter. At the meeting Ms. Hankins (sic) acknowledged her affair with defendant Southworth, reported that it was over, and requested confidentiality regarding the matter. Plaintiff did not inform defendant Heglar at this meeting about any sexual advances toward herself on the part of defendant Southworth.

Approximately two weeks after the meeting with defendant Heglar, plaintiff went to the Hankin residence and told Mr. Hankin, in the presence of his wife, Helen, about the affair between Helen and defendant Southworth. This was the first knowledge Mr. Hankin had of the incident. On February 5, 1981 Mr. and Mrs. Hankin met with defendants Schliske and Heglar. They indicated that they were there again at the request of plaintiff. The Hankins requested that defendant Southworth be asked to refrain from sexual involvement with students, but indicated that they did not wish to make a formal complaint and wanted the matter dropped.

Plaintiff testified that several other students were also involved in sexual affairs with defendant Southworth, and that two in particular had come to her for help. Both students testified at trial. One reported that defendant Southworth had made a sexual advance which she rejected. She refused to file a formal complaint and indicated that no retaliatory measures had been taken against her by defendant Southworth. The other student also denied any sexual involvement with defendant Southworth, and both students testified that they never sought assistance from plaintiff.

In February 1981, defendants Heglar and Schliske met with defendant Southworth and confronted him with the allegations. After initial denial, defendant Southworth admitted his involvement with students and was placed on permanent probation. There is no evidence that defendant Southworth was or has been involved in any impropriety involving students since that meeting. Plaintiff continued to make allegations against defendant Southworth.

Plaintiff was not offered employment for the summer 1981 session. Another highly qualified part-time employee was used to fill the position. In the fall of 1981, a third full-time staff member was hired. This factor, together with the availability of more qualified part-time employees, resulted in plaintiff not being offered employment for the fall 1981 semester.

Plaintiff's response to not being hired after the spring semester 1981 was to file a grievance with the college. The

grievance was filed in September 1981 and a hearing was held on the matter November 23 and 24, 1981. A transcript of that hearing has been made a part of the record in this case. At the grievance hearing plaintiff named persons who could corroborate her testimony. Many of them were called at trial, and not only failed to corroborate, but actually refuted the testimony plaintiff had given. Nonetheless, the grievance committee recommended reinstatement of plaintiff with back pay which recommendation was adopted by defendant Laramie County Community College Board, and attorney's fees added therein. Plaintiff was not satisfied with the reinstatement nor the amount of back pay. Thereafter, plaintiff filed charges of employment discrimination with the Equal Employment Opportunity Commission (EEOC) which made findings, recommendations, and issued a "Notice of Right to Sue." LCCC complied with the recommendations, increased the proposed amount of back pay and adopted specific policy and procedure on sexual discrimination and sexual harassment. Plaintiff was reemployed by LCCC in the fall of 1982 and continued teaching through the 1983 summer session. Prior to the fall semester in 1983, plaintiff indicated that she would be unavailable to teach the two classes assigned to her by the college, thereby terminating her relationship therewith.

This Court does not find reliable evidence of any retaliatory acts against plaintiff by any of the named defendants in response to her claims of discrimination.

Finally, this Court notes evidence which goes to plaintiff's credibility. Plaintiff testified under oath on more than one occasion, at trial, at the grievance hearing, and at depositions, that her first husband, Vaughn Thompson, was killed while in the service in Vietnam in the late fall of 1972 or spring of 1973. However, plaintiff filed for divorce from Mr. Thompson in May 1973, allegedly in an effort to tie up "loose ends" and present a more stable situation in her attempt to obtain custody of her younger twin brothers. The file from that divorce proceeding (Civil Action D-40713) received in part as an exhibit in the present matter, contained a waiver, consent, and acceptance of service signed by Vaughn M. Thompson, dated July 30, 1973 and notarized. The file also contains an affidavit of military

service dated December 21, 1973 and notarized, in which plaintiff swears under oath that her husband, Vaughn M. Thompson, is not engaged in the military service. The divorce was granted on that day, December 21, 1973. However, plaintiff's marriage to her second husband, Gary Long, took place on December 13, 1973, eight days prior to the dissolution of her former marriage.

Mr. Vaughn Thompson appeared at the trial of this matter and testified on behalf of defendants. His testimony indicated that upon his discharge from the service in March 1973, he never returned to active duty, never reenlisted. In the fall of 1972 and spring of 1973, he was living in North Carolina, where his family also lived, and where he received service in the divorce action.

CONCLUSIONS OF LAW

There are three steps involved in establishing a Title VII violation. First, the complainant (plaintiff) must establish a prima facie case of sexual harassment. The burden then shifts to the employer (defendants) to "articulate some legitimate, non-discriminatory reason for the employee's rejection." McDonnell Douglas Corp., infra. at 802. Finally, the employee (plaintiff) must be given an opportunity to show that the stated reasons of the employer (defendants) are merely pretextual. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

The evidence in this case has failed to show sexual harassment of plaintiff on behalf of defendant Southworth. Furthermore, the Court is not convinced that any retaliation was imposed by defendant LCCC or other individual defendants. Plaintiff has failed to present even a prima facie case. However, defendants presented legitimate reasons for their failure to offer plaintiff additional employment, including a reduced need for part-time faculty due to the hiring of additional full-time instructors, the availability of more qualified and highly trained instructors, and the fact that plaintiff had no reasonable expectancy of continued employment. Even if plaintiff had initially presented a prima facie case, the explanation given by defendants is reasonable and legitimate and could not be convincingly undermined by plaintiff as pretextual.

The proceedings in this matter have been *de novo* in nature, and this Court is not bound by the findings of the grievance committee, the LCCC Board, or the EEOC. This Court is convinced that those findings were based upon plaintiff's version of the facts, unsubstantiated and uncorroborated by any witnesses before this Court. Other than her own testimony, plaintiff was unable to provide evidence in support of the relevant and substantive facts of this case. Careful consideration of plaintiff's testimony, together with all the other facts and circumstances in this case, persuades the Court that the credibility of plaintiff is highly questionable.

For the above-stated reasons, plaintiff's claim for relief under 42 U.S.C. §§ 2000 e-2 and 2000 e-3 shall be dismissed with prejudice and plaintiff shall take nothing thereby.

Judgment will be entered in conformity with these Findings of Fact and Conclusions of Law.

Dated this 19th day of June, 1984.

EWING T. KERR

UNITED STATES
DISTRICT JUDGE

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

SHARON LEE LONG, *Plaintiff,* vs. LARAMIE COUNTY COMMUNITY COLLEGE DISTRICT; LARAMIE COUNTY COMMUNITY COLLEGE BOARD; RODNEY SOUTHWORTH, RICHARD WILLIAMS, ROBERT SCHLISKE, and HARLAN HEGLAR, *Defendants.*	No. C82-494-K

JUDGMENT

The above-entitled matter coming on regularly for trial before the Court sitting without a jury, plaintiff appearing by and through her attorneys, Richard C. LaFond and Jay Dee Schaefer; defendants Laramie County Community College District, Laramie County Community College Board, Richard Williams, Robert Schliske and Harlan Heglar appearing by and through their attorneys, Walter C. Urbigkit and George A. Zunker; and the defendant Rodney Southworth appearing by and through his attorneys, Craig Kirkwood and Kennard F. Wilson, and the Court having taken said matter under advisement and having prepared and filed its Findings of Fact and Conclusions of Law, finding generally for the defendants and against the plaintiff;

NOW, THEREFORE, IT IS ORDERED that plaintiff's claim for relief under §§ 703 and 704 of Title VII, 42 U.S.C. §§ 2000 e-2, 2000 e-3 be, and the same is, hereby dismissed with prejudice; it is

FURTHER ORDERED that plaintiff's prayer for attorney fees be, and the same is, hereby denied; it is

FURTHER ORDERED that each party pay its own costs.

DATED this 19th day of June, 1984.

EWING T. KERR

UNITED STATES
DISTRICT JUDGE

APPENDIX "D"

IN THE MATTER OF THE GRIEVANCE OF

SHARON LONG

vs.

RODNEY SOUTHWORTH, and
RICHARD WILLIAMS,
DEAN ROBERT SCHLISKE,
PRESIDENT HARLAN HEGLAR,
LARAMIE COUNTY COMMUNITY COLLEGE,

Respondents.

FINDINGS AND RECOMMENDATIONS OF THE GRIEVANCE COMMITTEE

The Grievance Committee of Laramie County Community College, composed of SUSAN K. LINE, Chairman, THOMAS NEAL, RICHARD T. O'GARA, JUDITH P. PRAY, and BRYAN E. SCOTT, met and deliberated on April 15, 16, and 20, 1982. Its FINDINGS AND RECOMMENDATIONS follow.

I. FINDINGS

1. We find that there is a basis for grievance in this matter.

2. We agree that sex discrimination is any employment practice in which an employer or his agents discriminate on the basis of sex against any person with respect to any matter directly or indirectly related to his or her employment; that sexual harassment is a form of sex discrimination; that sexual harassment is any behavior, unwelcome or unsolicited, either verbal

or physical in nature, which imposes a requirement of sexual cooperation as a condition of employment or academic advancement; that sexual harassment may range from forms of innuendo to coerced sexual relations in the context of inappropriate time and/or place; that such behaviors include, but are not restricted to, verbal harassment or abuse of a sexual nature, sexual remarks about a person's clothing, body or sexual activities, subtle pressure for sexual activity, unnecessary touching, patting or other forms of fondling, solicitation of sexual activity or other sex-linked behavior by promise of rewards by either party, demanding sexual favors accompanied by implied or overt threats concerning one's job, and sexual assault.

3. We agree further that professional harassment is such conduct which has the purpose of affecting or substantially interfering with an individual's performance and/or creating an intimidating, hostile, or offensive working environment.

4. We find that RODNEY SOUTHWORTH did sexually harass SHARON LONG.

5. We find further that RODNEY SOUTHWORTH did professionally harass SHARON LONG.

6. We find further that SHARON LONG sought redress with various agents of the college for the aforesaid harassment, and that in the process she received retaliatory action from agents of the college, and that, as a result, she was not re-employed by the college.

11. RECOMMENDATIONS

1. We recommend that SHARON LONG be reinstated on the "rotation list" of the Business Division as of the fall semester 1982.

2. We recommend further that SHARON LONG be awarded back wages totalling $4,080 (based on a minimum class load of one class per semester at $1,020 per class for each of the four semesters since she last was employed by the college in May of 1981.)

3. We recommend further that Laramie County Community College write and publish a sexual harassment policy and that such writing and publication, together with implementation, be completed no later than September 1, 1982.

4. We recommend further that Laramie County Community College hold a series of workshops during the fall semester of 1982 to make *all* of its employees aware of sexual harassment, to introduce and explain the above described sexual harassment policy, and to sensitize *all* of its employees to actions which may be construed as sexual harassment.

5. We recommend further that if, in the future, RODNEY. SOUTHWORTH is charged with and found guilty of sexual harassment and/or professional harassment and/or professional retaliation while in the employ of Laramie County Community College, he be immediately discharged.

III. CERTIFICATION

We, the undersigned, members of the Grievance Committee of Laramie County Community College, hereby attest and affirm that we singly and jointly agree with the above Findings and Recommendations, this 20th day of April, 1982.

_____

SUSAN K. LINE, Chairman

_____

THOMAS NEAL

_____

RICHARD T. O'GARA

_____

JUDITH P. PRAY

_____

BRYAN E. SCOTT

APPENDIX "E"

LARAMIE COUNTY COMMUNITY COLLEGE

* * * * * * * *

Docket 1981—Board—1

IN THE MATTER OF THE GRIEVANCE OF

SHARON LONG

vs.

RODNEY SOUTHWORTH, and RICHARD WILLIAMS, DEAN ROBERT SCHLISKE, PRESIDENT HARLAN HEGLAR, LARAMIE COUNTY COMMUNITY COLLEGE,

Respondents.

FINDINGS AND DECISIONS OF THE BOARD OF TRUSTEES OF LARAMIE COUNTY COMMUNITY COLLEGE

Pursuant to the Grievance Procedure of the Laramie County Community College;

A hearing having been heretofore conducted by the Grievance Committee of the College and its Findings and Recommendations submitted for consideration by the Board of Trustees of Laramie County Community College; and

The Board having reviewed the record, examined the transcripts and considered the exhibits;

NOW, THEREFORE, the Laramie County Community College, Board of Trustees enters its Findings of Fact and Conclusions of Law and Decision as follows:

A. Procedural and historical events involved in the hearing in this matter.

1. On August 21, 1981, Walter C. Urbigkit, Jr. of Urbigkit & Whitehead, P.C., acting as attorney for Laramie County Community College, received a communication from Graves, Hacker & Phelan in the nature of a complaint as submitted in behalf of Grievant, Sharon Long, herein designated, "Long", complaining against Respondent, Rodney Southworth, herein designated, "Respondent".

2. By communication dated August 28, 1981 the grievance complaint was scheduled for hearing on Wednesday, August 26, 1981 before the Board of Trustees of Laramie County Community College and then re-scheduled for hearing on September 14, 1981.

3. The following appearances were made: Long, Mary Elizabeth Galvan, Attorney at Law, Laramie, Wyoming. Southworth, Larry Lawton, Attorney at Law, Cheyenne, Wyoming.

4. The matter came on for hearing before the Board and upon Motion of Long the case was continued. By decision then made by the Board of Trustees, the grievance was re-referred for consideration by the Grievance Committee of Laramie County Community College as a body created by a written policy to consider grievances filed by employees or students of the institution.

5. The grievance which normally would have been first heard by Dean Robert Schliske, as the immediate supervisor of Southworth, in order that a fair and disinterested hearing would be affored (sic), was referred directly to the Grievance Committee because of the relationship of Dean Schliske to the grievance.

6. Those named as parties against whom the grievance was submitted, in addition to Southworth, included Dean Robert Schliske, Dean of Instruction; Richard Williams, Division Chairman; Dr. Harlan Heglar, President of Laramie County Community College; and the Laramie County Community College.

7. Responses of the various parties was (sic) duly made and presented to the College and the grievance came on regularly for hearing before the Grievance Committee, namely, Susan K. Line, Chairman, Thomas Neal, Richard T. O'Gara, Judith P. Pray and Bryan E. Scott on November 23 and November 24 at the Administration Building, Laramie County Community College.

8. At the hearing, Rodney Southworth acted as his own attorney. Ms. Mary Elizabeth Galvan was attorney for Sharon Long and Walter C. Urbigkit, Jr. of Urbigkit & Whitehead, P.C., entered an appearance and represented other respondents as representatives of (sic)and the college itself.

9. The testimony encompassing some approximately eighteen hours of time and three volumes of 348 pages, 307 pages and 123 pages was stenographically recorded by a registered professional reporter.

10. The decision of the Grievance Committee, following the hearing, was to defer action until the transcript was completed and all of the parties were afforded an opportunity to submit Proposed Findings of Fact and Conclusions of Law.

11. The decision of the Grievance Committee, in the nature of Findings and Recommendations, was then entered on the 20th day of April, 1982, which decision in conjunction with the record and documents of the case were considered in detail by the Board of Trustees of Laramie County Community College.

B. Substantive findings of Laramie County Community College, Board of Trustees.

1. There is a basis for the claimed grievance by Sharon Long in this case.

2. The Board recognizes that sex discrimination is any employment practice in which an employer or his agents discriminate on the basis of sex against any person with respect to any matter directly or indirectly related to his or her employment; that sexual harassment is a form of sex discrimination; that sexual harassment is any behavior, unwelcome or unsolicited, either verbal or physical in nature, which imposes a requirement of sexual cooperation as a condition of employment or academic advancement; that sexual harassment may range from forms of innuendo to coerced sexual relations in the context of inappropriate time and/or place; that such behaviors include, but are not restricted to, verbal harassment or abuse of a sexual nature, sexual remarks about a person's clothing, body or sexual activities, subtle pressure for sexual activity, unnecessary touching, patting or other forms of fondling, solicitation or sexual activity or other sex-linked behavior by promise of rewards by either party, demanding sexual favors accompanied by implied or overt threats concerning one's job, and sexual assault.

3. The Board further considers that professional harassment is such conduct which has the purpose of affecting or substantially interfering with an individual's performance and/or creating an intimidating, hostile, or offensive working environment.

4. The records (sic) supports the findings of the Grievance Committee that Rodney Southworth did sexually harass Sharon Long.

5. The record supports the findings of the Grievance Committeee that Rodney Southworth did professionally harass Sharon Long.

6. The record supports the findings of the Grievance Committee that Sharon Long sought redress with

various agents of the College for the aforesaid harassment and that in the process she received retaliatory action from agents of the College, and that, as a result, she was not re-employed by the College.

II. LEGAL CONCLUSIONS AND DECISION

1. The Laramie County Community College shall reinstate Sharon Long in an appropriate position to her education and teaching abilities as of the Fall Semester 1982.

2. Laramie County Community College shall repay to Sharon Long back wages in an amount of $4,080.00 as based on a minimum class load of one class per semester or a $1,020.00 per class for each of the four semesters since she was last employed by the College in May of 1981 and shall pay, in addition, the sum of $1,500.00 as reasonable attorney's fees for application on her cost in employing an attorney in the grievance procedure.

3. The administration, through the President of Laramie County Community College, shall formulate recommendations for a written sexual harassment policy which document shall be presented for consideration by the Board of Trustees of the College not later than the first Board meeting in July, 1982.

4. In the event that Rodney Southworth should hereafter be charged with and found guilty of sexual harassment to an employee or student at the Laramie County Community College or professional harassment and/or professional retaliation against any employee of the Laramie County Community College while he continues in any salary position with the institution then he will be immediately subject to notice and discharge by action of this Board of Trustees.

5. The Grievance Committee is commended for the dedication and serious attention to the requirements of acting as a representative of the Board of Trustees and the Board will not tolerate any retaliation by any College personnel against members of the Grievance Committee or witnesses or other College personnel who have been involved in this proceedings. (sic)

ORDER AND DIRECTION

The Board of Trustees, having jurisdiction of the matters herein contained hereby reinstates Sharon Long pursuant to the foregoing and directs that she be repaid a total of $4,080.00 plus $1,500.00 to apply on attorney's fees and that the other matters noted and directed herein shall be carried out in accord with the tenure of this decision pursuant to the provisions of Wyoming Statute relating to the powers of the Board of Trustees of the Community College and the provisions of Section 7 of the Laramie County Community College Grievance Procedure.

DATED this 12th day of May, 1982.

LARAMIE COUNTY BOARD OF TRUSTEES,

_____

Mark Rinne, President

_____

Elizabeth Phelan

_____

Donna Smith

_____

Rodger McDaniel

_____

Arling Wiederspahn

_____

John Morris

_____

James Barrett

APPENDIX "F"

DEPARTMENT OF EDUCATION
REGION VIII
FEDERAL OFFICE BUILDING
1961 STOUT STREET
DENVER, COLORADO 60294

November 3, 1982

Re: #08822015

Dr. Harlan Heglar
President
Laramie County Community College
1400 East College Drive
Cheyenne, Wyoming 82001

Dear Dr. Heglar:

The Office for Civil Rights (OCR) has completed its investigation of an allegation of discrimination against Laramie County Community College (LCCC) filed by Ms. Sharon Long.

Ms. Long specifically alleged that she and female students had been subjected to sexual harassment by a staff member and that she was not rehired by LCCC in retaliation for her efforts to serve as an advocate for the students. This Office investigated under Title IX of the Education Amendments of 1972 and its implementing regulation, specifically 34 C.F.R. § 106.71, which incorporates by reference § 100.7(e) of the regulations implementing Title VI of the Civil Rights Act of 1964 (34 C.F.R. Part 100), and 34 C.F.R. §§ 106.8; 106.31(b)(1), (2), (3), (4) and (8).

OCR initiated an investigation of all of the issues raised by Ms. Long. Her allegation that female students as a class and Ms. Long individually were subjected to sexual harassment was resolved by a pre-determination settlement, with remedies

acceptable to the complainant and OCR, prior to the completion of our investigation.

A Statement of Findings detailing the results of our investigation of the retaliation allegation is enclosed. In summary, OCR found that the complainant was not reemployed by the College in retaliation for her efforts on behalf of female students who were being sexually harassed.

On September 24, 1982, representatives of the Office for Civil Rights met with Mr. Walter Urbigkit to discuss the proposed findings of our investigation and to identify any plans the College may already be implementing which would correct the inequities that were found.

On October 8 and 14, 1982, we received letters from Mr. Urbigkit, on behalf of the College, which confirmed the remedial action that the College had agreed to undertake (copies attached). The offer was contingent upon the complainant's agreeing to release any further claims for lost compensation or other damages arising from this incident.

On November 1, 1982, the complainant, through her attorney, informed this Office that she would not sign such a waiver.

Based upon your written assurance that you were willing to implement the necessary remedial action, we consider LCCC to be presently fulfilling its obligations under 34 C.F.R §§ 106.71 and 100.7(e). Therefore, we are closing the case effective the date of this letter.

The Freedom of Information Act requires that OCR release this letter and other information about this case upon request by the public. In the event that OCR receives such a request, we will make every effort to protect information that identifies individuals or that, if released, would constitute an unwarranted invasion of privacy.

This letter and the Statement of Findings address only the issues listed above and should not be interpreted as a determination of the College's compliance or noncompliance with Title IX in any other respect.

We wish to thank you and your staff for the cooperation extended to OCR investigators throughout the course of the investigation.

If you have any further questions, please contact Ms. Cathy Olivier, Regional Attorney, Office for Civil Rights at (303) 837-4511 or Dr. Joseph Torres, Division Director, Postsecondary Education, Office for Civil Rights at (303) 837-3723.

Sincerely,

Gilbert D. Román, Ed.D.
Regional Director

Enclosure

STATEMENT OF FINDINGS
Long v. Laramie County Community College
Docket #08822015

The Office for Civil Rights (OCR) has completed its investigation of Laramie County Community College (LCCC) in response to a complaint alleging sexual harassment and retaliation filed by Ms. Sharon Long. Following are the findings and conclusions from the investigation.

I. *Jurisdiction*

The allegations were investigated under Title IX of the Education Amendments of 1972 and its implementing regulation, specifically 34 C.F.R. § 106.71 which incorporates by reference 34 C.F.R. 100.7(e), and 34 C.F.R. §§ 106.8; 106.31(b)(1), (2), (3), (4) and (8).

II. *Allegations*

The complainant alleged that (1) she and female students were sexually harassed by a staff member and (2) she was not rehired by LCCC in retaliation for her efforts to serve as an advocate for the students.

III. *Background*

The complainant was hired by LCCC in the fall of 1977 as a part-time instructor in data processing. She taught each Fall, Spring and Summer semester until the end of Spring semester 1981 at which time her letter of employment was not renewed.

When the complainant did not receive a letter of employment for the summer semester of 1981, she contacted an attorney because she believed the reason she was not rehired was due to sexual harassment and retaliation for her role as a student advocate. Discussion between the complainant's attorney and the institution's attorney culminated in a grievance hearing being held on November 23-24, 1981.

The Grievance Committee found that (1) complainant had been sexually harassed and (2) that she was terminated in

retaliation for her efforts on behalf of the female students. Sexual harassment of the students was not an issue before the Grievance Committee.

The complainant filed with OCR because she was dissatisfied with the scope of the remedy. She was satisfied with reinstatement, but not with the amount of back pay offered.

OCR initiated an investigation of all the issues raised by the complainant. The complainant's allegation that female students as a class and the complainant individually were subjected to sexual harassment was resolved by pre-determination settlement prior to the completion of this investigation with remedies acceptable to the complainant and OCR. These remedies are as follows:

(1) The adoption of a policy defining sexual harassment and procedures for handling sexual harassment complaints.

(2) The holding of sexual harassment workshops for all LCCC employees.

(3) A rider attached to the respondent's employment contract whereby he agreed to the conditions established by the board regarding further charges of sexual harassment.

We completed our investigation of the complainant's allegation that she was terminated in retaliation for her efforts to serve as an advocate for female students who had been sexually harassed and our findings are set forth below.

IV. *Findings*

In mid December 1980, the complainant approached the Chairman of her department and apprised him that her fellow instructor was sexually harassing students. The Dean of Instruction (the Chairman's supervisor) stated that as a result of this meeting, the Chairman advised the Dean of potential problems arising because of the instructor's involvement with students and that the Chairman was instructed to investigate the matter. The

complainant also had a meeting with the Dean of Instruction to inform him of the rumors concerning the male instructor because she did not believe the Chairman had investigated her allegation.

On January 22, 1981, the complainant met with the President, again because she did not feel anything was being done about the instructor's sexual harassment of students. One such student accompanied her to this meeting, and again in a subsequent meeting with the President on February 3, 1981, the complainant expressed her concerns regarding the effects of the instructor's behavior on students, and on their grades. The student also expressed such concerns.

Subsequently other students called or met with the President concerning affairs or advances by the instructor. Concern over grades was expressed. The President asked the Dean of Instruction to attend one of these meetings.

On February 10, 1981, a meeting was held by the President and Dean with the instructor to apprise him of the allegations made by the complainant and students. The instructor at first denied and later admitted the affair with the one student. He was subsequently placed on probation and advised that further sexual relationships or advances would result in his termination. Complainant was never apprised of this action.

The complainant's teaching load was reduced from a $^{13}/_{16}$ths instructor in the fall of 1980, to six hours in the spring of 1981 without explanation to her. She was not hired to teach in the summer of 1981.

The complainant's contract was not renewed for the fall of 1981, and she was never notified either formally or informally that she would not be rehired, even though she had taught each of the previous four years without interruption.

According to the Chairman of her Department, the College had two reasons for not rehiring the complainant. First, although the complainant had taught each summer since she was hired in 1977, it was not her turn on the rotation system in the summer of 1981. He described rotation as a system whereby more than one person is available to teach in a given area. He stated that

it was another instructor's turn to teach the only introductory course that summer. The existence of a rotation system was not offered as a reason for not hiring the complainant for the fall semester.

Second, the Chairman stated that the complainant was not rehired because it was not in the best interest of the school. He explained that the computer program was growing and developing in quality and that the complainant had not sought to improve her educational background. (The complainant does not have a college degree.)

Title IX forbids recipients from retaliating against an individual "for the purpose of interfering with any right of privilege secured by Title IX." (34 C.F.R. § 106.71 incorporating by reference 34 C.F.R. § 100.7(e).) To determine whether retaliation has occurred, the Department has relied upon the analytical framework that has been established under Title VII case law. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Hockstadt v. Worester Foundation*, 545 F.2d 222 (1976); and *Texas Department of Community Affairs v. Burdine*, 101 S. Ct. 1089 (1981).

To establish a prima facie case of retaliation, the following factors must be shown: (1) was the complainant engaged in protected activity; (2) was the employer aware of that activity; (3) was adverse action subsequently taken against the complainant; and (4) did the adverse action follow within such a time period that a retaliatory motive can be inferred.

The complainant can establish a prima facie case. She was engaged in protected activity when she attempted to intercede on behalf of the students (34 C.F.R. § 106.31(b)(1), (2), (3), (4) and (8), her employer was well aware of her activity as she lodged her complaint directly with the College, adverse action (non-renewal of her contract) was subsequently taken against the complainant and the adverse action followed within such a time period (six months) that a retaliatory motive can be inferred.

Once the complainant has established a prima facie case, the question then becomes whether the recipient can articulate

legitimate, non-discriminatory reasons for its actions. LCCC stated two reasons for the complainant's termination, but we have concluded that both of these reasons were pretextual. The evidence presented during the Grievance Procedure and made available to OCR showed that there had not been a rotation policy in the Department of Computer Sciences. While such a system had been used informally in the business law area, it had never been used in the area in which the complainant worked. The complainant was never told that she was not being rehired because it was not her turn on rotation.

With regard to the complainant's academic credentials, the Chairman admitted during the hearing that he had never told the complainant that her employment would be contingent upon her continuing her education. The complainant's teaching evaluations were consistently high for each of the twelve previous semesters. She was complimented frequently by her colleagues and she was assigned increasing teaching duties until the Spring of 1981. Testimony established that the complainant had, in fact, indicated her desire to pursue her education.

Conclusion:

Based upon the foregoing, we have concluded that LCCC's stated reasons for its decision to not rehire the complainant are not supported by the evidence. We must conclude that the more likely motivation for its action was to discriminate against the complainant. Accordingly, we find that LCCC has not complied with the requirements of 34 C.F.R. § 100.7(e), incorporated by reference in 34 C.F.R. § 106.71.

However, in letters frm the College's representative dated October 8 and 14, 1982, the College agreed to take the following action:

(1) The complainant will be awarded an additional $3,265.00 in back pay. (She had previously been awarded $4,080.00 back pay by the Grievance Committee.)

(2) To the extent possible, relations between the complainant and her Divisions Chairman will be com-

municated in writing and personal contact will be minimized. Where personal discussion between the complainant and the Division Chairman involving job responsibilities, including class assignments, of a significant nature is required, either the Dean of Instruction or his designee will be in attendance.

(3) Decisions on scheduling of the complainant's classes will be made at a level higher than that of the Division Chairman.

(4) The complainant may take any complaint involving alleged discrimination in supervisory exercise of College administration directly to the Dean of Instruction.

(5) Other relationship responsibilities for management and supervision must be retained essentially within the division, unless a significant problem develops at which point the Academic Dean will be involved.

(6) The complainant submit to the College her plan to obtain a degree.

Letters from LCCC's counsel confirming the terms of this agreement are attached. The School's offer was contingent upon the complainant's agreeing to release any further claims for lost compensation or other damages arising from this incident.

On November 1, 1982 the complainant, through her attorney, informed this Office that she would not sign such a waiver.

Based upon written assurances that LCCC was willing to implement the necessary remedial action, we consider LCCC to be presently fulfilling its obligation under 34 C.F.R. § 106.71 and 34 C.F.R. § 100.7(e).